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No. 99-1387

In The Supreme Court of the United States

STEPHEN L. LANGLIE,

Petitioner,

v.

ONAN CORPORATION, A DIVISION OF CUMMINS ENGINE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Onan Corporation is a wholly-owned subsidiary of Cummins Engine Company. No publicly-held company owns ten percent or more of the stock of Cummins Engine Company.

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REASONS FOR DENYING THE WRIT

The considerations governing this Court's review on certiorari are not satisfied here. There is no conflict among the Circuits on the issue presented by this case, and the case satisfies none of the other criteria that would make it a suitable candidate for this Court's review.

The Petition simply does not do justice to the procedural history or the facts of this case. From all that appears from the Petition, one would assume that this case involved only a claim under the Employee Retirement Income Security Act of 1974 (hereafter "ERISA"). (Pet. 4-14) In fact, as is clearly evident from the opinion below (App. 1a-7a), the case that was tried involved primarily allegations of unlawful age and disparate impact discrimination. As the court below noted (App. 2a), a jury found that Petitioner was not discharged on account of his age, and the evidence adduced at trial was more than sufficient to support that verdict. Moreover, the court below correctly held that Plaintiff had wholly failed to present a *prima facie* case of disparate impact discrimination (App. 3a-5a).

The ERISA retaliation claim which the Petition now suggests was the major issue posed by this litigation was substantially an afterthought, comprising five sentences at the end of Petitioner's nineteen page complaint.

The court below properly concluded that, on this record, it was entirely unnecessary to reach out to decide the question whether Section 510 of ERISA gives rise to a private cause of action for retaliation based on informal protests. (App. 5a-6a) While both courts assumed without deciding that such a claim

did exist, the District Court granted a directed verdict on this claim, holding that Petitioner had not established a *prima facie* case. The Court of Appeals chose to premise its affirmance on this issue on prior case law holding that there is no right to a jury trial under ERISA. (App. 6a)

Petitioner strenuously argues that this exceedingly small part of the opinion below cries out for plenary review by this Court. However, even if this Court should be inclined at some point to address that legal question, this is manifestly not the appropriate case in which to do so. Here, as the District Court correctly ruled, even assuming there were a private cause of action for retaliation based on informal protests under Section 510, the evidence produced at trial was as a matter of law wholly insufficient to establish a *prime facie* case.

Accordingly, since the district court record fully supports the decision below as to that case-specific issue (Petitioner's Issue 3), this case is simply not an appropriate vehicle for this Court to use to address the broader legal issues posed (Petitioner's Issue 1 and Issue 2).[1] In sum, none of the considerations governing review on certiorari (Sup. Ct. R. 10) support review here.

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[1] As if to confirm that the evidence at trial was insufficient to establish a *prima facie* case, the Petition contains three separate references (at 4, 6, and 13) to non-record materials regarding a proceeding in the United States Tax Court involving Onan's retirement plan. The Tax Court proceeding was brought by a different plan participant years after Petitioner resigned his employment with Onan. Petitioner's only "role" in that proceeding has been confined to contributing to adverse press coverage of Onan's retirement plan by making false statements to the media. In any event, this non-record material simply is not properly before this Court and should not have been referred to in the Petition.

Since The District Court Properly Granted A Directed Verdict On The Retaliation Claim, This Case Does Not Present A Proper Occasion To Address The Legal Issues Argued In The Petition.

In the district court, Petitioner presented a single "retaliation" claim, purportedly based upon the Age Discrimination in Employment Act, the Minnesota Human Rights Act, and ERISA. Petitioner alleged that he engaged in protected acts beginning with his age discrimination charge in 1984, and continuing with his protests to changes in the pension plan beginning in 1988, for which Onan allegedly retaliated many years later. The district court directed a verdict on this claim,[2] primarily because Plaintiff could not establish the required causal connection between protected conduct and alleged retaliation from 1984 forward.

This Court need not decide whether a private right of action for retaliation exists under § 510 of ERISA. As the district court correctly ruled in granting a directed verdict, the evidence simply did not support such a claim under ERISA. ERISA § 510 claims are analyzed under the three-stage framework used under Title VII and other federal civil rights statutes. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992). That is, the plaintiff must make out a *prima facie* case of discrimination by showing that the plaintiff engaged in protected activity, that his employment was adversely affected by the defendant, and that there is a causal relationship between the adverse action and the protected activity. *Rath*, 978 F.2d at 1090; *Jackson v. Missouri Pacific*

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[2] Contrary to the Petition (at 4), the directed verdict was not *sua sponte*, but rather in response to a formal motion by Respondent.

R.R., 803 F.2d 401, 406-7 (8th Cir. 1986). Under the three-stage analysis used to analyze discrimination claims, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its actions only if the plaintiff succeeds in making out a *prima facie* case of discrimination. *Rath*, 978 F.2d at 1089-90; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Here, Petitioner did not establish any adverse conduct by Onan. The evidence was uncontradicted that Petitioner resigned rather than accepting an equivalent assignment after his position was eliminated.

Furthermore, Petitioner certainly did not establish a causal connection between any statutorily protected conduct and retaliation at the time of, or after, the conduct. The record in this case is clear that Petitioner's position was eliminated in a company-wide reduction-in-force. The record is entirely devoid of any evidence that Petitioner's position was eliminated because of his previous charge of discrimination many years earlier, or any of his complaints regarding the changes to Onan's pension plan. Petitioner's previous charge of age discrimination occurred in 1984, eleven years prior to his leaving the company. He had been a vocal opponent of the pension plan changes since 1988. The elimination of his position did not occur until 1995. The length of time between the protected conduct and the purported consequence is, in itself, sufficient to negate the notion of a causal connection between the two.

Consideration of the events that took place between Petitioner's protected conduct and the end of his employment at Onan makes the absence of a causal connection even more

clear. The timing of the decision to eliminate Petitioner's position bears no relationship to his previous claim of age discrimination and his on-going complaints regarding Onan's changes to its pension plan. Despite his activities and complaints, he weathered reductions-in-force in 1985, 1989, 1992, and 1994. In 1993, the department for which Petitioner worked was moved from Fridley, Minnesota to Onan's facility in Huntsville, Alabama. Petitioner was to be transferred to Huntsville with the department. He asked to be assigned to another department, in order to stay at the Fridley plant. Rather than forcing him to either accept the move or resign, Onan allowed him to remain in its employ by placing him in another department. If Onan truly wanted to retaliate against Petitioner, it could have simply terminated him after he refused to transfer to the Huntsville facility, or included him among one of the several pre-1995 reductions-in-force. It did not. Instead, it gave him a raise virtually every year.

To state a claim under 29 U.S.C. § 1140, a plaintiff is required to show a causal connection between activity protected by ERISA and an adverse employment action. *Kinkead v. Southwestern Bell Telephone Co.*, 49 F.3d 454, 456 (8th Cir. 1995). As the district court aptly reasoned:

> [I]t's impossible for me to believe, and I will not ask the jury to conjecture that [it took Onan] 11 years to retaliate. A corporation can figure out if it wants to retaliate a whole lot faster than over an 11-year period . . . . There's no indication that the people involved [in eliminating Petitioner's position] knew that he had filed that age claim.

With respect to the claimed retaliation for pension protests, the court noted,

> The problem here is, [Petitioner's] activities concerning an ERISA plan are of long record. And again, there is no evidence showing that what happened to him was a result of this as differentiated from every other person who is in a protected age class. All of the age discriminatory evidence . . . relates to his confederates, and there's no indication whatsoever that his confederates were also among those who . . . protested about the pension plan . . . . [O]nce again, it beggars the imagination that it took [Onan] 11 years to get rid of a troublemaker if the troublemaker they were unhappy about was complaining about an ERISA plan, and I don't have evidence to support that.

The relevant case authorities fully support the district court's conclusion that a multiple year gap between the act which supposedly triggered retaliation, and the employee's decision to leave employment, is simply too tenuous to support an inference of causal relationship. This is particularly true here in light of the intervening events and reductions in force which did *not* affect Petitioner. *See e.g. Figgous v. Allied/Bendix Corp.*, 906 F.2d 360, 362 (8th Cir. 1990); *Rath*, 978 F.2d at 1090

To be sure, there may be cases where the proof at trial is such that a causal link may be shown through facts other than

proximity and timing. *But this is not such a case -- there was no such evidence here, and Petitioner cites none.*

Accordingly, since Petitioner simply failed to present enough evidence to get to a jury on the ERISA retaliation claim, this is not an appropriate case for this Court to reach out and decide two abstract issues of law: whether a claim for such retaliation even exists, and if so, whether a jury trial is required for such a claim. If and when a case comes before this Court on a proper record raising such issues, the Court may wish to decide those legal issues. This is manifestly not the right case in which to do so.

Finally, it bears noting that the single reported appellate decision Petitioner cites in support of his arguments under § 510, *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70 (7th Cir. 1996), affirmed a summary judgment against the plaintiff/employee, since he could not meet his burden to show that the legitimate reasons offered for his termination were mere pretext. That decision contains no analysis of whether private claims under § 510 should be recognized, nor does it say anything at all about a right to a jury trial. Either the issues were never raised there, or else the 7th Circuit Court concluded, just as the Eighth Circuit Court did in *Rath*, that such an analysis was unnecessary given the plaintiff's failure of proof.

The other two appellate decisions cited by Petitioner on this point--*Senn v. United Dominion Indus. Inc*, 951 F.2d 806 (7th Cir. 1992), and *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983)-- involve entirely different sections of ERISA. More important, both cases turn solely on whether adding what both courts characterize as an equitable claim under ERISA to an action at law for damages under the Labor Management

Relations Act will deprive a party of the right to a jury trial that unquestionably would have applied to the latter claim had it been brought alone. Therefore, not only do those decisions have nothing whatever to do with the issue in this case, they also do not in any way support Petitioner's contention that there is a conflict in the Circuits that this Court must remedy.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this case does not merit further review. Accordingly, we respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,
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